CHAPTER 5

THE DOCTRINE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES

5.1 The Basic Concept.

a. General. If a remedy available within the military criminal justice system or an administrative remedy provided by statute or regulation is capable of providing a plaintiff with the relief he seeks, the federal courts have generally required, as a matter of judicial administration, that the plaintiff use the available remedy before seeking judicial relief.[1] The Supreme Court recently held, however, that federal courts do not have the authority to require that plaintiffs exhaust available administrative remedies before seeking judicial review of agency administrative actions under the Administrative Procedure Act (APA), except where exhaustion is specifically mandated by statute or agency rule.[2] The Court relied on the

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[1]See, e.g., Navas v. Vales, 752 F.2d 765, 769 (1st Cir. 1985); Michaelson v. Herren, 242 F.2d 693 (2d Cir. 1957); Nelson v. Miller, 373 F.2d 474 (3d Cir.), cert. denied, 387 U.S. 924 (1967); Sanders v. McCrady, 537 F.2d 1199 (4th Cir. 1976); Von Hoffburg v. Alexander, 615 F.2d 633 (5th Cir. 1980); Seepe v. Department of the Navy, 518 F.2d 760 (6th Cir. 1975); Diliberti v. Brown, 583 F.2d 950 (7th Cir. 1978); Horn v. Schlesinger, 514 F.2d 549 (8th Cir. 1975); Patillo v. Schlesinger, 625 F.2d 262 (9th Cir. 1980); Thornton v. Coffey, 618 F.2d 686 (10th Cir. 1980); Linfors v. United States, 673 F.2d 332 (11th Cir. 1982); Knehans v. Alexander, 566 F.2d 312 (D.C. Cir. 1977), cert. denied, 435 U.S. 995 (1978). But cf. Heisig v. United States, 719 F.2d 1153 (Fed. Cir. 1983) (exhaustion of military administrative remedies only permissive, not mandatory).

As a general rule, plaintiffs need not exhaust remedies before filing a claim under 42 U.S.C. § 1983, Patsy v. Florida Bd. of Regents, 457 U.S. 496 (1982); see generally infra chapter 9. However, several courts have held that exhaustion is required in § 1983 suits against the military and its officials. Crawford v. Texas Army Nat'l Guard, 794 F.2d 1034 (5th Cir. 1986); Furman v. Edwards, 657 F. Supp. 1243 (D. Vt. 1987). See also Sandidge v. Washington, 813 F.2d 1025, 1026 n.1 (9th Cir. 1987); Penagaricano v. Llenza, 747 F.2d 55, 61 (1st Cir. 1984) (noting but not deciding question). See Wright v. Park, 5 F.3d 586 (1st Cir. 1993).

[2]Darby v. Cisneros, 113 S. Ct. 2539 (1993). See 95 Colum. L. Rev. 749, 755; 108 Harv. L. Rev. 27, 101; 93 Mich. L. Rev. 1, 3.

language of section 10(c) of the APA to find that Congress had effectively codified the doctrine of exhaustion of administrative remedies where it provided that appeal to "superior agency authority" is a prerequisite to judicial review only when expressly required by statute or an agency rule. The impact of this precedent will probably be felt most in predischarge military personnel cases seeking equitable relief under the APA. This chapter considers the doctrine of exhaustion of remedies in military administrative cases; chapter 8 discusses the role of the exhaustion doctrine in military criminal cases.

b. Purposes of the Exhaustion Doctrine. The exhaustion of remedies requirement serves several purposes.[3] First, exhaustion may avoid burdening the courts with cases that can be resolved through the administrative process.[4] "A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene."[5] Second, completion of the full administrative review process focuses factual and legal arguments and provides a valuable written record in the event judicial review becomes necessary. "[W]hatever judicial review is available will be informed and narrowed by the agency's own decision."[6] Third, reliance on the administrative process allows full use of the expertise of military decisionmakers.[7] A federal district judge may consider one military case a year; a member of a military administrative

[3]See McCarthy v. Madigan, 112 S. Ct. 1081 (1992); Schlesinger v. Councilman, 420 U.S. 738, 756-57 (1975); McKart v. United States, 395 U.S. 185, 193-95 (1969); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938). See generally Sherman, Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement, 55 U. Va. L. Rev. 483, 497 (1969).

[4]Schlesinger, 420 U.S. at 756-57; McKart, 395 U.S. at 195.

[5]McKart, 395 U.S. at 195. See Lewis v. Reagan, 660 F.2d 124, 127 (5th Cir. 1981); Von Hoffburg, 615 F.2d at 637; Seepe, 518 F.2d at 764; Krudler v. United States Army, 594 F. Supp. 565, 568 (N.D. Ill. 1984).

[6]Schlesinger, 420 U.S. at 756. See McKart, 395 U.S. at 194; Von Hoffburg, 615 F.2d at 637; Hodges v. Callaway, 499 F.2d 417, 423 (5th Cir. 1974).

[7]Schlesinger, 420 U.S. at 756; Lewis, 660 F.2d at 127; Seepe, 518 F.2d at 764.

board will consider hundreds.[8] Finally, the exhaustion doctrine removes the friction caused by judicial intrusion into military affairs. It permits the military to discover and correct its own errors, and it prevents the "deliberate flaunting of administrative processes [which] could weaken the effectiveness of an agency by encouraging people to ignore its procedures."[9]

c. Jurisdictional Nature of the Exhaustion Doctrine. The exhaustion doctrine is a judge-made rule that is generally not jurisdictional, but prudential.[10] "Only when Congress states in clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision . . . has the Supreme Court held that exhaustion is a jurisdictional prerequisite."[11] The courts of appeals may split on the issue of whether exhaustion of administrative remedies is a jurisdictional prerequisite to suit under a particular statute.[12] Where jurisdictional, the district court must dismiss the action pending exhaustion. Alternatively, where courts consider exhaustion to be a nonjurisdictional requirement, they may retain jurisdiction and simply stay the proceedings until the plaintiff pursues administrative remedies.

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[8]See, e.g., Navas v. Vales, 752 F.2d 765, 769-70 (1st Cir. 1985).

[9]McKart, 395 U.S. at 195. See Von Hoffburg, 615 F.2d at 637; Hodges, 499 F.2d at 423.

[10]McDonald v. CenTra, 946 F.2d 1059, 1063 (4th Cir. 1991).

[11]I.A.M. Nat'l Pension Fund v. Stockton TRI Indus., 727 F.2d 1204, 1208 (D.C. Cir. 1984). See Weinberger v. Salfi, 422 U.S. 749 (1975).

[12]While Darby v. Cisneros, 113 S. Ct. 2539 (1993) removed any doubt as to whether exhaustion is a jurisdictional prerequisite for suits brought under the APA's waiver of sovereign immunity, its reach is limited to those suits. Compare Linfors v. United States, 673 F.2d 332 (11th Cir. 1982); Seepe v. Department of the Navy, 518 F.2d 760 (6th Cir. 1975); Hodges v. Callaway, 499 F.2d 417 (5th Cir. 1974); Michaelson v. Herren, 242 F.2d 693 (2d Cir. 1957), with Montgomery v. Rumsfeld, 572 F.2d 250 (9th Cir. 1978); Nelson v. Miller, 373 F.2d 474 (3d Cir.), cert. denied, 387 U.S. 924 (1967); Sohm v. Fowler, 365 F.2d 915 (D.C. Cir. 1966); Reed v. Franke, 297 F.2d 17 (4th Cir. 1961). See Sherman, supra note 3, at 502.

d. The Exhaustion Doctrine and the Statute of Limitations

(1) General. As a general rule, plaintiffs must commence a civil action against the United States within six years after the right of action first accrues or the suit is barred.[13] Moreover, both the Boards for Correction of Military (or Naval) Records and the Discharge Review Boards have their own limitation periods: three years for the correction boards,[14] and 15 years for the discharge review boards.[15] A failure to timely institute a civil action against the United States is a nonwaivable, jurisdictional bar to suit.[16] On the other hand, the limitations periods for the corrections boards and the discharge review boards are not jurisdictional and may be (and often are) waived.[17] Indeed, 10 U.S.C. § 1552(b) expressly provides that correction boards may excuse an untimely application "if it finds it to be in the interest of justice."

(2) Accruals of actions and the exhaustion of administrative remedies. For purposes of the statute of limitations, "a claim against the United States first accrues on the date when all events have occurred which fix the liability of the Government and entitle the claimants to institute an action."[18] Put another way, "'a cause of action is deemed to have accrued when facts exist which enable

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[13]28 U.S.C. § 2401(a).

[14]10 U.S.C. § 1552(b).

[15]10 U.S.C. § 1553(a).

[16]See, e.g., Sisseton-Wahpeton Sioux Tribe v. U.S., 895 F.2d 588, 592 (9th Cir. 1990); United States v. Sams, 521 F.2d 421, 429 (3d Cir. 1975); United States v. One 1961 Red Chevrolet Impala Sedan, 457 F.2d 1353, 1357 (5th Cir. 1972).

[17]See, e.g., Guerrero v. Marsh, 819 F.2d 238, 241 (9th Cir. 1987); Nichols v. Hughes, 721 F.2d 657 (9th Cir. 1983); Long v. United States Dep't of Defense, 616 F. Supp. 1280 (E.D.N.Y. 1985); Yagjian v. Marsh, 571 F. Supp. 698 (D.N.H. 1983); Kaiser v. Sec'y of Navy, 525 F. Supp. 1226 (D. Colo. 1981); Mulvaney v. Stetson, 470 F. Supp. 725 (N.D. Ill. 1979).

[18]Oceania Steamship Co. v. United States, 165 Ct. Cl. 217, 225 (1964). See also June v. Sec'y of Navy, 557 F. Supp. 144, 148 (M.D. Pa. 1982).

one party to maintain an action against another."[19] Courts generally agree that challenges to adverse personnel actions -- such as involuntary discharges, court-martial convictions, and promotion passovers -- must be filed within six years of the date on which the adverse action is completed.[20] Courts do not agree, however, about what effect a plaintiff's application to a discharge review board or a correction board has on the statute of limitations. For example, does an application to a discharge review board or a correction board toll the running of the limitations period? And does an application to a discharge review board or a correction board more than six years after the challenged adverse action revive the statute of limitations? In the few courts that deem recourse to military administrative remedies to be permissive rather than mandatory, an application to a discharge review board or a correction board does not toll or revive the limitations period.[21] In jurisdictions that require exhaustion of military administrative remedies, however, most courts hold that applications to discharge review boards or correction boards both toll and revive the statute of limitations. For example, in Dougherty v. United States Navy Board for Correction of Naval Records,[22] the plaintiff received a general discharge for "unsuitability" in 1957. In 1983, Dougherty applied to the Board for Correction of Naval Records (BCNR) to change the character of his discharge. That same year, more than 26 years after his discharge (but while the BCNR was still considering the application), Dougherty filed suit in federal court, challenging the failure of the BCNR to give him relief. Following the BCNR's denial of

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[19]Victor Foods v. Crossroads Economic Development, 977 F.2d 1224, 1225 (8th Cir. 1992); Konecny v. United States, 388 F.2d 59, 65 (8th Cir. 1967), (quoted by Pacyna v. Marsh, 617 F. Supp. 101, 102 (W.D.N.Y. 1984), aff'd, 809 F.2d 792 (Fed. Cir. 1986), cert. denied, 481 U.S. 1048 (1987)).

[20]Geyen v. Marsh, 775 F.2d 1303, 1307-08 (5th Cir. 1985); Willcox v. United States, 769 F.2d 743 (Fed. Cir. 1985); Walters v. Sec'y of Defense, 725 F.2d 107, 111-15 (D.C. Cir. 1983). But Kaiser v. Sec' of Navy, 525 F. Supp. 1226, 1228 (D. Colo. 1981); Wood v. Sec'y of Defense, 496 F. Supp. 192, 198 (D.D.C. 1980) (courts holding § 2401(a) inapplicable to adverse administrative separations). Cf. Guerrero, 819 F.2d at 238 (no statute of limitations prevents courts from ordering correction board to decide whether Board's limitation period should be waived).

[21]See, e.g., Hurick v. Lehman, 782 F.2d 984, 986-87 (Fed. Cir. 1986).

[22]784 F.2d 499 (3d Cir. 1986).

Dougherty's application in 1984, the district court dismissed the lawsuit, reasoning that the statute of limitations barred the claim. The United States Court of Appeals for the Third Circuit, reversed. The circuit court differentiated a lawsuit challenging the refusal of a correction board to upgrade the discharge from one attacking the discharge itself; the latter action accrues when the discharge is received, the former when the correction board rules. Thus, Dougherty's action accrued in 1984, when the BCNR issued its decision denying relief.

> After careful consideration of the case history and relevant cases in federal courts, we hold that the six-year statute of limitations for the instant action did not begin to run until the BCNR issued its final decision. Consequently, the instant actions is not time barred.
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> In applying the statute of limitations, we must determine what action the district court is being asked to review. Is it reviewing the 1957 discharge or the 1984 action of the BCNR refusing to correct the records relating to that discharge? The standard of review of the district court is instructive. The district court is to set aside the BCNR action if it finds it to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (1977). The review is generally limited to the administrative record. . . . The fact that the district court must base its decision on an administrative record compiled in 1984 relating to a proceeding in 1984 suggests that the statute of limitations should not begin running based on any other event. While the basic factual issue centers around something which occurred many years earlier, the wrong asserted in the district court is not the discharge itself but its treatment by the BCNR. . . .
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> . . . In the instant case, the BCNR decided to waive the statute of limitations and address the merits of Dougherty's claim. Having done so, . . . we see no persuasive reason to cut off judicial review of the 1984 administrative action of the BCNR.[23]

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[23] Id. at 501. See Guitard v. United States Secretary of the Navy, 967 F.2d 737, 740 (2d Cir. 1992); Blassingame v. Sec'y of Navy, 811 F.2d 65, 70-73 (2d Cir. 1987); Smith v. Marsh, 787 F.2d 510, 511-12 (10th Cir. 1986); Geyen v. Marsh, 775 F.2d 1303, 1308-10 (5th Cir. 1985), reh'g denied, 782 F.2d 1351 (5th Cir. 1986); Vietnam Veterans v. Sec'y of Navy, 642 F. Supp. 154, 156-57 (D.D.C. 1986); Bittner v. Secretary of Defense, 625 F. Supp. 1022, 1028-29 (D.D.C. 1985); White v. Sec'y of Army, 629 F. Supp. 64, 67-68 (D.D.C. 1984); Swann v. Garrett, 811 F. Supp. 1336, 1338 (N.D. Ind. 1992); Mahoney v. United States, 610 F. Supp. 1065, 1067-68 (S.D.N.Y. 1985); Yagjian v. Marsh, 571 F. Supp. 698, 706-07 (D. N.H. 1983); Kaiser v. Sec'y of Navy, 525 F. Supp.

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5.2 What Remedies Must Be Exhausted

a. Introduction. Servicemembers have several avenues of administrative recourse to challenge putatively unlawful or unjust military determinations. Most important among these are the Army Board for Correction of Military Records [ABCMR], the Army Discharge Review Board [ADRB], and article 138 of the Uniform Code of Military Justice [UCMJ].

b. Army Board for the Correction of Military Records (ABCMR).

(1) General. "Prior to 1946, disputes arising out of an individual's service to his country in times of war and peace were resolved by the passage of private bills by Congress."[24] After World War II, the demands by servicemembers for private relief legislation increased dramatically.[25] To relieve itself of this burden, Congress authorized the secretary of each service to create administrative forums for considering such grievances. The result was the boards for the correction of

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1226, 1230 (D. Colo. 1981); Wood v. Secretary of Defense, 496 F. Supp. 192, 198 (D.D.C. 1980); Mulvaney v. Stetson, 470 F. Supp. 725, 730 (N.D. Ill. 1979). See also Guerrero v. Marsh, 819 F.2d 238 (9th Cir. 1987) (no statute of limitations prevents courts from ordering correction board to decide whether Board's limitation period should be waived). Cf. Ballenger v. Marsh, 708 F.2d 349, 351 (8th Cir. 1983); Pacyna v. Marsh, 617 F. Supp. 101, 103 (W.D.N.Y. 1984), aff'd, 809 F.2d 792 (Fed. Cir. 1986), cert. denied, 107 S. Ct. 2177 (1987); Bethke v. Stetson, 521 F. Supp. 488, 490 (N.D. Ga. 1979), aff'd, 619 F.2d 81 (5th Cir. 1980) (cases holding that multiple applications to correction boards do not each revive the statute of limitations).

[24]Glosser & Rosenberg, Military Correction Boards: Administrative Process & Review by the United States Court of Claims, 23 Am. U.L. Rev. 391, 392 (1973). See Strang v. Marsh, 602 F. Supp. 1565, 1569 (D.R.I. 1985).

[25]Kiddoo, Boards of Justice, Soldiers Mag., October 1982, at 34.

military (or naval) records.[26] The legislation governing the correction boards is codified at 10 U.S.C. § 1552 and provides in part:

> (a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of the Treasury may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.
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> (c) The department concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be. . . .
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> (f) With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed . . . , action under subsection (a) may extend only to--
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> (1) correction of a record to reflect actions taken by reviewing authorities . . . ; or
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> (2) action on the sentence of a court-martial for purposes of clemency.

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[26]Legislative Reorganization Act of 1946, ch. 743, § 207, 60 Stat. 812, 837. See Strang, 602 F. Supp. at 1569; Glosser & Rosenberg, supra note 24, at 392.

(2) Scope of Remedy. 10 U.S.C. § 1552 gives service secretaries, acting through their boards for correction of military records, plenary authority to afford relief to servicemembers injured by adverse or undesired personnel actions. The correction boards can void promotion passovers, reverse involuntary separations, upgrade less than honorable discharges, provide constructive service credit, remove adverse information from personnel files, make disability determinations, and award back pay and allowances, including retirement pay.[27] However, the Military Justice Act of 1983 limited the authority of the boards to review court-martial proceedings. The boards may now only make corrections necessary to reflect actions taken by reviewing authorities or actions on sentences for purposes of clemency.[28] This legislation statutorily overruled the decision of the United States Court of Appeals for the District of Columbia Circuit, in Baxter v. Claytor,[29] which held that correction boards were obligated to review court-martial convictions on the application of affected servicemembers or former servicemembers. Despite this limitation, correction boards remain the key administrative remedy in military personnel litigation.

(3) Composition and Procedures. The ABCMR is governed by Army Regulation 15-185.[30] The board is composed of high-ranking Army civilian employees who sit on a rotating, additional-duty basis.[31] Three members constitute a quorum.[32] The board has jurisdiction to consider all applications properly before it for the purpose of determining the existence of an error or an injustice

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[27]See generally Glosser & Rosenberg, supra note 24, at 402-09.

[28]Pub. L. No. 98-209, § 11(a), 97 Stat. 1407 (codified at 10 U.S.C. § 1552(f)); Cooper v. Marsh, 807 F.2d 988, 990-91 (Fed. Cir. 1986). See Stokes v. Orr, 628 F. Supp. 1085, 1086 (D. Kan. 1985) (Military Justice Act of 1983 applies retroactively).

[29]652 F.2d 181 (D.C. Cir. 1981).

[30]Dep't of Army, Reg. 15-185, Army Board for Correction of Military Records (1 May 1982) [hereinafter AR 15-185].

[31]Id. para. 3b. See Kiddoo, supra note 25, at 34.

[32]AR 15-185, supra note 30, para. 3b.

in military records.[33] As noted above, a claimant normally must file the application for correction within three years after discovery of a putative error or injustice; however, this limitation period can be waived in the "interest of justice."[34] Prior to seeking relief from the ABCMR, applicants must exhaust all other administrative remedies (such as the ADRB).[35] The board has the discretion to grant a hearing on an application;[36] this discretion is subject to judicial interference only if exercised arbitrarily and capriciously.[37] Following consideration of an application, the board makes findings and recommendations, which it forwards for approval to the Secretary of the Army or his delegee.[38] If the board denies relief, it must state the grounds for denial.[39] The ABCMR is not bound, however, by the doctrine of stare decisis.[40] The Secretary of the Army or his delegee will either approve or disapprove the board's recommendation, or remand the application for further consideration.[41]

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[33]Id. paras. 4-5.

[34]Id. para. 7.

[35]Id. para. 8. See Sherengos v. Seamans, 449 F.2d 333 (4th Cir. 1971).

[36]AR 15-185, supra note 30, para. 11.

[37]See, e.g., Dodson v. U.S. Government, Dep't of Army, 988 F.2d 1199, 1204-05 (Fed. Cir. 1993); Marcotte v. Sec'y of Defense, 618 F. Supp. 756, 765 (D. Kan. 1985); Kalista v. Sec'y of Navy, 560 F. Supp. 608 (D. Colo. 1983), aff'd, No. 83-1531 (10th Cir. Mar. 15, 1984).

[38]AR 15-185, supra note 30, para. 19.

[39]Urban Law Inst. v. Sec'y of Defense, No. 76-0530 (D.D.C. Jan. 31, 1977) (settlement agreement), cited in Stichman, Developments in the Military Discharge Review Process, 4 Mil. L. Rptr. 6004, 6009 (1976).

[40]Strang v. Marsh, 602 F. Supp. 1565 (D.R.I. 1985).

[41]AR 15-185, supra note 30, para. 20. See, e.g., Kolesa v. Lehman, 597 F. Supp. 463 (N.D.N.Y. 1984).

(4) Necessity of Recourse to the ABCMR. Unless federal courts found that one of the exceptions to the exhaustion doctrine applies,[42] they almost uniformly required plaintiffs to seek relief from the ABCMR before they would review a military personnel determination.[43] An illustration of this requirement is the United States Court of Appeals for the Fifth Circuit's decision in Hodges v. Callaway.

HODGES v. CALLAWAY
499 F.2d 417 (5th Cir. 1974)

> On June 1, 1972, the Department of the Army directed the Commanding General of Fort Benning, Georgia, to grant Staff Sergeant (E-6) Kenneth L. Hodges an honorable discharge as soon as possible "for the convenience of the Government." Then midway through his second six-year period of enlistment in the Army, Sergeant Hodges was understandably unwilling to see his hopes for a military career so abruptly terminated, even for the price of an honorable discharge. Accordingly, on June 7, 1972, two days before the date set for his separation, Sergeant Hodges invoked the assistance of the United States District Court for the Middle District of Georgia.
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> As subsequent amendments to the pleadings made clear, the gravamen of Hodges' complaint was that though ostensibly ordered "for the convenience of the Government," the discharge was in fact designed as punishment for Hodges' participation in the tragic events at My Lai 4, Republic of South Vietnam, on March 16, 1968. Recognizing that the Army's actions did comply with the procedures established in Army Regulation [AR] 635-200 for discretionary "convenience discharges" and

[42]See infra § 5.3.

[43]See, e.g., Guitard v. United States Sec'y of Navy, 967 F.2d 737, 741 (2d Cir. 1992); Woodrick v. Hungerford, 800 F.2d 1413, 1417-18 (5th Cir. 1986); Muhammad v. Sec'y of Army, 770 F.2d 1494, 1495 (9th Cir. 1985); Navas v. Vales, 752 F.2d 765 (1st Cir. 1985); Linfors v. United States, 673 F.2d 332 (11th Cir. 1982); Von Hoffburg v. Alexander, 615 F.2d 633 (5th Cir. 1980); Patillo v. Schlesinger, 625 F.2d 262 (9th Cir. 1980); Thornton v. Coffey, 618 F.2d 686 (10th Cir. 1980); Knehans v. Alexander, 566 F.2d 312 (D.C. Cir. 1977), cert. denied, 435 U.S. 995 (1978); Martin v. Stone, 759 F. Supp. 19 (D.D.C. 1991); Schaefer v. Cheney, 725 F. Supp. 40 (D.D.C. 1989); Furman v. Edwards, 657 F. Supp. 1243, 1245-46 (D. Vt. 1987); Ayala v. United States, 624 F. Supp. 259, 263 (S.D.N.Y. 1985); Steenson v. Marsh, 609 F. Supp. 800, 801-02 (N.D. Ala. 1985); White v. Sec'y of Army, 629 F. Supp. 64, 66-67 (D.D.C. 1984); Mozur v. Orr, 600 F. Supp. 772 (E.D. Pa. 1985); Covill v. United States, 596 F. Supp. 789 (E.D. Mich. 1984); Krudler v. United States Army, 594 F. Supp. 565 (N.D. Ill. 1984); Cody v. Scott, 565 F. Supp. 1031 (S.D.N.Y. 1983).

apparently conceding the constitutional validity of those procedures, Hodges insisted that in his case the Army should have followed the procedures outlined in AR 635-212 for discharges based on misconduct. Alleging that the pretextual "convenience" discharge contravened his right to due process of law, Hodges sought a temporary restraining order to halt his discharge pending a hearing on the merits of his claim and ultimately an injunction against his discharge pending compliance with the applicable regulations and "minimum concepts of fairness."

For over a year the district court stayed the Army's discharging hand in order to preserve the status quo pending disposition of the case on its merits. Following an evidentiary hearing in May 1973, however, the district court on June 20, 1973, granted a partial summary judgment for defendants-appellees and dismissed Hodges' complaint for failure to state a claim and for want of subject matter jurisdiction. Now a civilian, Hodges asked to reverse the district court and order the Army to follow the procedures set forth in AR 635-212. Notwithstanding the importance of Hodges' challenge to the action taken below, our attention to the merits of the appellant's position is deflected at the threshold by a jurisdictional problem not detected by either the parties or the district court.

Although federal courts are not totally barred from barracks rooms and billets, our access is restricted. Writing for this Court in Mindes v. Seaman, 5 Cir. 1971, 453 F.2d 197, 201, Judge Clark framed a general statement for our authority:

> a court should not review internal military affairs in the absence of (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of available intraservice corrective measures.

The first portion of this formula may often be the more difficult to apply, for not all allegations technically within its perimeters are reviewable. Thus the trial court must "examine the substance of [the] allegation in the light of the policy reasons behind nonreview of military matters," balancing inter alia, the nature and strength of the challenge to the military determination, the potential injury to the plaintiff if review is refused, the type and degree of anticipated interference with the military function, and the extent to which the exercise of military expertise or discretion is involved. Id. At the same time, concentration on the balancing act required to measure the sufficiency of the allegations should not obscure the importance of the second portion of the Mindes formula--the exhaustion requirement.

Beginning with McCurdy v. Zuckert, 5 Cir. 1966, 359 F.2d 491, . . . this Court has firmly adhered to the rule that a plaintiff challenging an administrative military

discharge will find the doors of the federal courthouse closed pending exhaustion of available administrative remedies. Accord, Davis v. Secretary of the Army, 5 Cir. 1971, 440 F.2d 817; Stanford v. United States, 5 Cir. 1969, 413 F.2d 1048; Tuggle v. Brown, 5 Cir., 362 F.2d 801. . . . For the purposes of this requirement, two types of administrative bodies provide review of discharge decisions. The Army Discharge Review Board [ADRB], established pursuant to 10 U.S.C. § 1553 (1974 Supp.) and 32 C.F.R. § 581.2 (1973), has authority to review the type of discharge given and to direct the Adjutant General to "change, correct, or modify any discharge or dismissal, and to issue a new discharge. . . ." 32 C.F.R. § 581.2(a)(1) (1973). Established pursuant to 10 U.S.C. § 1552 (1970) and 32 C.F.R. § 581.2, the Army Board for Correction of Military Records [ABCMR] is to "consider all applications properly before it for the purpose of determining the existence of an error or injustice," 32 C.F.R. § 581.3(b)(2) (1973), and may "correct any military record . . . to correct an error or remove an injustice." 10 U.S.C. § 1552(a).

As previous decisions of this Court should have made clear, our basic exhaustion principle has two important corollaries. First, as with exhaustion of administrative remedies in other contexts, the exhaustion doctrine in review of military discharge decisions is subject to limitations or exceptions. The most important of these is that only those remedies which provide a real opportunity for adequate relief need be exhausted. Stated somewhat differently, exhaustion is inapposite and unnecessary when resort to the administrative reviewing body would be futile. For example, a plaintiff obviously need not appeal to the particular DRB or BCMR if the relief requested is not within the authority or power of those bodies to grant.

The second corollary to our basic exhaustion principle is that having once determined the applicability of the exhaustion doctrine, a district court generally may not further entertain a complaint until the requirement is satisfied. If the suit was filed after discharge, the court may not retain jurisdiction while the plaintiff resorts to administrative review. And if the suit was filed before discharge, the court may not stay the discharge pending exhaustion of administrative remedies. This latter result is required by the authorizing statute in cases in which the desired relief falls within the bailiwick of the DRB, for those bodies are limited to post-discharge reviews, 10 U.S.C. § 1553(a) (1974 Supp.). This Court has also directed this result when the requested relief lies within the competence of a BCMR, notwithstanding the statutory authority of BCMR's to entertain pre-discharge appeals and the willingness of some of those boards to do so if a court will stay discharge pending administrative review.

Examination of the case sub judice in light of these two corollaries to the exhaustion doctrine clearly reveals the error below. Although appellant initially alleged that he had exhausted available intraservice remedies, it is quite clear that he has not yet attempted appeal to either the ADRB or the ABCMR. Appellees have conceded that

Hodges need not approach the ADRB since that body deals only with changes in the type of discharge, whereas Hodges is complaining basically of the fact of discharge. They stoutly insist, however, that he should be required to appeal to the ABCMR. Unable to see any compelling reason to place this case within the category of cases generally excepted from the exhaustion requirement, we agree.

It seems quite clear to us that the ABCMR can, if it determines that Hodges has been illegally discharged, grant him full reinstatement and restoration of all rights, thus in effect making him whole for any injury he might suffer from a wrongful discharge. In addition, appellant Hodges complains of exactly the sort of injury for which the BCMR can supply effective and adequate balm. The gravamen of the complaint is that the Army did not follow the proper regulations in processing his discharge; whether this is viewed as a legal or a factual question, the Army ought to be the primary authority for the interpretation of its own regulations. A decision by the ABCMR that the Army should have followed AR 635-212 might completely obviate the need for judicial review. If, on the other hand, the ABCMR concludes that AR 635-212 is inapplicable to the facts in this case and Hodges then seeks judicial review, the court will at least have a definitive interpretation of the regulation and an explication of the relevant facts from the highest administrative body in the Army's own appellate system [citations omitted].

Hodges argues that resort to the ABCMR in his case would obviously be futile and therefore ought not to be required. Since the Secretary of the Army ordered this discharge, Hodges insists, the ABCMR would be very reluctant to find any significant error in Hodges' favor. Besides, the statute grants final approval over the Board's decision to the Secretary, and he most certainly would not countermand himself, regardless of the Board's recommendation.

Appellees offer several responses to the futility argument. Although we do not share their overly sanguine view regarding the efficacy of the intraservice administrative review procedures, we do agree that requiring Hodges to exhaust those remedies will not necessarily be an exercise in futility. According to the Army regulations implementing 10 U.S.C. § 1552, the ABCMR may not "deny an application on the sole ground that the record was made by or at the direction of the President or the Secretary in connection with proceedings other than proceedings of a Board for the correction of military and naval records." 32 C.F.R. § 581.3(c)(5)(ii). The BCMR's action is subject to judicial reversal if it is arbitrary, capricious, unsupported by substantial evidence, or erroneous law. Sanford v. United States, 9 Cir. 1968, 399 F.2d 693. . . . Moreover, though the Secretary may overrule the Board's recommendations for relief, he cannot do so arbitrarily; if he rejects the Board's recommendations, he must provide either explicitly stated policy reasons, or his action must be supported by the record and evidence presented to the Board [citations omitted].

In any event, to base an exception to the exhaustion requirement on the fact that the final administrative decision is subject to the discretionary power of the Secretary would in effect turn the exhaustion doctrine on its head. Exhaustion is required in part because of the possibility that administrative review might obviate the need for judicial review. That the administrative process might not have this effect is not usually a reason for bypassing it. And since the Service Secretary always has the final say over decisions by both the DRB and the BCMR, appellant's futility reasoning would mean that exhaustion of intraservice remedies should always be excused. The administrative remedy available to grievants like appellant Hodges may offer cold comfort and small consolation, but it is surely beyond our authority to permit the exceptions to the exhaustion doctrine to swallow the rule.

We recognize, of course, that considerable resources, judicial as well as combatant, have been expended since this litigation began over two years ago. And mindful of Mr. Justice Black's warning in another context against administrative procedures that exhaust the grievant before he can exhaust them, we are conscious of the burden on a plaintiff who at this stage of the game learns that he must begin anew at square one. Yet as serious as these considerations may be in Sergeant Hodges' individual case, we do not believe they justify overriding the exhaustion requirement. The exhaustion doctrine rests on legitimate and important policy objectives relating to the balance between military authority and the power of federal courts. Adherence to the exhaustion requirement in cases presenting the type of challenge to administrative discharge decisions being mounted here will serve well these objectives.

For one thing, we can avoid premature court review that might upset the balance between the civilian judiciary and the military as a separate administrative and judicial system. We can prevent untoward, unreasonable interference with the efficient operation of the military's judicial and administrative systems and allow the military an opportunity to exercise its own expertise and rectify its own errors before a court is called to render judgment. Moreover, we can guard, at least in the future, against inefficient use of judicial resources by requiring "finality" within the military system and thus avoiding needless review.

Since the exhaustion requirement does apply in the instant case, our decisions in McCurdy v. Zuckert, supra, and Tuggle v. Brown, supra, command that the district court have no further jurisdiction over the case until the requirement be satisfied. Accordingly, we reverse the decision of the court below and remand the case with instructions to dismiss without prejudice for failure to exhaust intraservice administrative remedies.

We emphasize that our holding is only that Hodges approached the courthouse prematurely and that the court below erred in permitting him to enter without first surmounting the exhaustion hurdle. Hodges would synomize pessimism with futility, but courts must--at least initially--indulge the optimistic presumption that the military will afford its members the protections vouchsafed by the Constitution, by the statutes, and by its own regulations. Certainly Kenneth L. Hodges did not surrender his right to due process of law when he doffed mufti. When he has completed his intraservice appeals, he is free to return in search of judicial review. The barricade erected by the exhaustion requirement does not completely block the courtroom door.

Reversed and remanded.

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c. Army Discharge Review Board (ADRB).

(1) General. Like the military correction boards, Congress created the discharge review boards to eliminate the tremendous burden of private relief legislation that arose during World War II.[44] This legislation, codified at 10 U.S.C. § 1553, provides in relevant part:

> (a) The Secretary concerned shall, after consulting the Administrator of Veterans' Affairs, establish a board of review, consisting of five members, to review the discharge or dismissal (other than a discharge or dismissal by sentence of a general court-martial) of any former member of an armed force under the jurisdiction of his department upon its own motion or upon the request of the former member or, if he is dead, his surviving spouse, next of kin, or legal representative. A motion or request for review must be made within 15 years after the date of the discharge or dismissal. With respect to a discharge or dismissal adjudged by a courtmartial case . . . , action under this subsection may extend only to a change in the discharge or dismissal or issuance of a new discharge for purposes of clemency.
>
> (b) A board established under this section may, subject to review by the Secretary concerned, change a discharge or dismissal, or issue a new discharge, to reflect its findings.

[44]Serviceman's Readjustment Act of 1944, Pub. L. No. 346, 58 Stat. 284 (1944). See Strang v. Marsh, 602 F. Supp. 1565, 1569 (D.R.I. 1985); Stichman, supra note 39, at 6001; Glosser & Rosenberg, supra note 24, at 392.

> (c) A review by a board established under this section shall be based on the records of the armed forces concerned and such other evidence as may be presented to the board. A witness may present evidence to the board in person or by affidavit. A person who requests a review under this section may appear before the board in person or by counsel or an accredited representative of an organization recognized by the Administrator of Veterans' Affairs under chapter 59 of title 38.

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(2) Scope of Remedy. The ADRB has the power to upgrade the character of any discharge or dismissal except a discharge or dismissal adjudged by the sentence of a general court-martial.[45] Where it has jurisdiction, the board is charged with reviewing the propriety and equity of an applicant's discharge and, if necessary, with effecting changes in its character.[46] The board does not have the power to enjoin a separation; its jurisdiction is triggered only on discharge or dismissal.[47] Moreover, as in the case of correction boards, the Military Justice Act of 1983 limited the power of discharge review boards to consider the character of discharges adjudged by courts-martial to determinations based on clemency.[48]

(3) Composition and Procedures. The ADRB is composed of one or more panels of five senior Army officers.[49] The senior member of the panel is the presiding officer.[50] An applicant

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[45]10 U.S.C. § 1553(a).

[46]Dep't of Army, Reg. 15-180, Army Discharge Review Board, at A-39 (15 Oct. 1984) [hereinafter AR 15-180], (citing Dep't of Defense Directive 1332.28, Discharge Review Board (DRB) Procedures & Standards, at Encl. 4, para. A (Aug. 11, 1982) [hereinafter DOD Dir. 1332.28]).

[47]See 10 U.S.C. § 1553(a); AR 15-180, supra note 46, at A-7 (citing DOD Dir. 1332.28, at Encl. 2, para. A; Hodges v. Callaway, 499 F.2d 417, 421 (5th Cir. 1974)).

[48]Pub. L. No. 98-209, § 11(b), 97 Stat. 1407 (codified at 10 U.S.C. § 1553(a)).

[49]AR 15-180, supra note 46, para. 3c.

[50]Id.

must file a request for review of the character of a discharge or dismissal with the board within 15 years of issuance.[51] Applicants are entitled to hearings before the board on request.[52] In each case properly before it, the board considers the propriety and equity of the character of the discharge or dismissal at issue, whether adjudged administratively or by court-martial (other than by general court-martial).[53] In every case granting or denying relief, the board must prepare a detailed statement of findings, conclusions, and reasons.[54] The board is not bound, however, by its decisions in prior cases.[55] Decisions of the ADRB are subject to review by the Secretary of the Army.[56] However, unlike the ABCMR, which can only make recommendations, the ADRB can render final decisions.[57]

(4) Necessity of Recourse to the ADRB. Although case law on the issue is relatively sparse, prior to Darby v. Cisneros, an application to the ADRB was generally required before a challenge to the character of a discharge or dismissal was lodged in the federal courts.[58] A claim for

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[51]10 U.S.C. §1553(a); AR 15-180, supra note 46, at A-9 (citing DOD Dir. 1332.28, at Encl. 3, para. A2).

[52]28 U.S.C. §1553(c); AR 15-180, supra note 46, at A-14 (citing DOD Dir. 1332.28, at Encl. 3, para. B3).

[53]AR 15-180, supra note 46, at A-39 (citing DOD Dir. 1332.28, at Encl. 4, para. A). But cf. Military Justice Act of 1983, Pub. L. No. 98-209, § 11(b), 97 Stat. 1407 (1983) (codified at 10 U.S.C. § 1553(a)) (discharges adjudged by courts-martial can only be reviewed for purposes of clemency).

[54]Urban Law Inst. v. Secretary of Defense, No. 76-0530 (D.D.C. Jan. 31, 1977) (settlement), cited in, Stichman, supra note 39, at 6001; AR 15-180, supra note 46, at A-32 to A-34 (citing DOD Dir. 1332.28, at Encl. 3, para. H).

[55]Strang v. Marsh, 602 F. Supp. 1565 (D.R.I. 1985).

[56]10 U.S.C. § 1553(b).

[57]Id. See AR 15-180, supra note 46, at A-29 (citing DOD Dir. 1332.28, at Encl. 3, para. G).

[58]See, e.g., Michaelson v. Herren, 242 F.2d 693 (2d Cir. 1957); Pickell v. Reed, 326 F. Supp. 1086 (N.D. Cal.), aff'd, 446 F.2d 898 (9th Cir.), cert. denied, 404 U.S. 946 (1971).

strictly equitable relief, such as a discharge upgrade, is precisely the type of APA claim over which Darby would preclude a federal court from imposing a jurisdictional exhaustion requirement.

d. Article 138, UCMJ.

(1) General. Article 138, UCMJ, provides a means by which servicemembers can seek redress for perceived wrongs caused by their commanding officers. Article 138 has an ancient lineage. Redress provisions existed in the Code of Articles of King Gustavus Adolphus of Sweden of 1621, the Articles of War of James II of England of 1688, and the British Articles of War of 1765, which were in force at the beginning of the American Revolutionary War.[59] America's first military codes, the Massachusetts Articles of War of April 1775 and the American Articles of War of June 30, 1775, contained similar provisions.[60] Thereafter, all of the Articles of War of the United States contained means by which soldiers could rectify wrongs committed by their commanders.[61] With the enactment of the UCMJ in 1950, the redress provisions became Article 138, which provides:

> Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

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[59]See W. Winthrop, Military Law & Precedents 908, 927-28, 937-38 (2d ed. 1920 reprint).

[60]Id. at 949, 954.

[61]See, e.g., Articles of War of 1806, arts. 34-35; Articles of War of 1874, arts. 29-30.

(2) Scope of Remedy. Although by its terms Article 138 seemingly provides redress for all wrongs committed by commanding officers, it is limited to grievances not rectifiable by other means. Where other statutes or regulations provide a review process, Article 138 generally is inappropriate.[62] For example, courts-martial, nonjudicial punishment, involuntary separations, filings of adverse information are all reviewable through other channels; thus, they are not subject to Article 138 relief.[63] Moreover, recourse to Article 138 is available only to members of the military on active duty and subject to the UCMJ.[64] Article 138 complaints cannot be filed by civilians or former servicemembers seeking relief for wrongs committed while they were on active duty.

(3) Procedure. Redress of wrongs under Article 138 involves a two-step process. First, the servicemember must make a written request for redress of the wrong to the commanding officer he believes wronged him.[65] If the commander does not grant relief, the soldier may then submit a complaint under Article 138, which goes to the officer exercising general court-martial jurisdiction for examination and action.[66] Regardless of whether redress is granted, the complaint is forwarded to Headquarters, Department of the Army, for review and, if necessary, further action.[67]

(4) Necessity of Recourse to Article 138. When available, servicemembers generally must avail themselves of the redress provided by Article 138 before seeking relief in the federal courts. The following case illustrates this requirement.

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[62]Dep't of Army, Reg. 27-10, Military Justice, para. 20-5a (8 Aug. 1994).

[63]Id. para. 20-5b.

[64]Id. paras. 20-2, 2-4a.

[65]Id. paras. 20-3a(1), 20-6.

[66]Id. paras. 20-3a(1), 20-7 to 2-11.

[67]Id. para. 20-12

McGAW v. FARROW
472 F.2d 952 (4th Cir. 1973)

Before WINTER, BUTZNER and RUSSELL, Circuit Judges.

DONALD RUSSELL, Circuit Judge:

The plaintiffs seek declaratory and injunctive relief in connection with the denial by the commander of the military base at Fort Eustis, Virginia, of their application to use the chapel facilities at such base for "a religious memorial service * * * for all Indo-China war dead." They describe themselves as persons "who are now, or, have been and will be, members of the United States Army stationed at Fort Eustis, Virginia". It is their contention that the denial to them of the use of such facilities was "arbitrary and capricious ** * without any rational basis in fact and represented an abusive use of military authority", in violation of plaintiffs' constitutional right of free speech, peaceful assembly and the exercise of religious freedom. The defendants moved to dismiss the complaint and for summary judgment both on the procedural ground that plaintiffs were without standing and, substantively, on the ground that the action of the camp commander in denying the application was neither arbitrary nor capricious.

[The court first found that the district court lacked subject matter jurisdiction over the plaintiffs' claims.]

II.

There was a second basis for dismissal. Military procedures, as embodied in Section 938, 10 U.S.C., and as set forth in Army Regulations, provide a method of appeal from the action of the camp commander in this case. This administrative remedy within the procedures provided in the military administration system was admittedly known to the plaintiffs. It is well settled that, "Exhaustion of administrative remedies provided by the military service is a required predicate to relief in the civil courts." Before resorting to court action, the plaintiffs were accordingly obligated to exhaust the administrative remedy thus provided within the military system. They could not escape this obligation with the claim that they were not on "any level of technical equality as it applies to military law" with the officers to whom they had directed their application. The plaintiffs were not, by their own admission, novices in the field of military law. They conceded they knew of the right to appeal. At least one of the plaintiffs had exercised the right of appeal under the applicable statute and regulations. The complaint was accordingly properly dismissed for failure to exhaust administrative remedies.

Affirmed.[68]

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e. Other Administrative Remedies. In addition to the ABCMR, the ADRB, and Article 138, servicemembers have a number of other administrative remedies. These range from clemency,[69] to inspector general complaints,[70] to various "open door" polices and unit "hot lines." Although little case law mandates recourse to these remedies,[71] they should be raised by military attorneys. If nothing else, the remedies demonstrate that the military provides means through which servicemembers can voice complaints.

5.3 Exceptions to the Exhaustion Doctrine.

a. Introduction. The federal courts have created a number of exceptions to the exhaustion requirement.[72] Generally, exhaustion is not required if the administrative remedies cannot provide adequate relief, if recourse to the remedies would be futile or cause irreparable injury, and if the only questions at issue are purely legal in nature. Courts have also excused plaintiffs from seeking

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[68]See also Woodrick v. Hungerford, 800 F.2d 1413, 1418 (5th Cir. 1986); Schatten v. United States, 419 F.2d 187, 191 (6th Cir. 1969); United States ex rel. Berry v. Commanding General, 411 F.2d 822, 825 (5th Cir. 1969); Ayala v. United States, 624 F. Supp. 259, 262-63 (S.D.N.Y. 1985); Adkins v. United States Navy, 507 F. Supp. 891 (S.D. Tex. 1981); Casey v. Schlesinger, 382 F. Supp. 1218, 1220-21 (N.D. Okl. 1974); Schmidt v. Laird, 328 F. Supp. 1009 (E.D.N.C. 1971).

[69]See 10 U.S.C. §§ 874, 951-54.

[70]See Dep't of Army, Reg. 20-1, Inspector General Activities and Procedures, ch. 6 (56 Mar. 1994).

[71]See, e.g., Kaiser v. Sec'y of Navy, 542 F. Supp. 1263 (D. Colo. 1982) (recourse to Navy Clemency Board not required because relief provided is a matter of administrative grace).

[72]See Guitard v. United States Sec'y of Navy, 967 F.2d 737, 741 (2d Cir. 1992).

administrative relief in class actions when administrative remedies can provide only piecemeal relief to a limited part of the class.

b. Inadequacy/Futility. An administrative remedy is inadequate if it cannot afford the relief the plaintiff seeks from the court. For example, a servicemember fighting an involuntary separation need not first seek review of the case in the ADRB, since the discharge review board lacks the power to enjoin a discharge.[73] It can only upgrade the character of discharges already issued.[74] The futility exception, on the other hand, assumes that the relief sought by the plaintiff is within the power of the administrative remedy to afford, but that the relief will not be afforded for one reason or another. The following case illustrates both the inadequacy and futility exceptions to the doctrine.

VON HOFFBURG v. ALEXANDER
615 F.2d 633 (5th Cir. 1980)

Before TUTTLE, FAY and THOMAS A. CLARK, Circuit Judges.

FAY, Circuit Judge:

> Plaintiff Marie Von Hoffburg was honorably discharged from the United States Army because of her alleged homosexual tendencies. Just prior to her discharge, she instituted this action against the Secretary of the Army and others, seeking a declaratory judgment, injunctive relief and monetary damages. The United States District Court for the Middle District of Alabama dismissed the complaint without prejudice because plaintiff had failed to exhaust her administrative remedies.
>
> Plaintiff now appeals the dismissal of her action, claiming that exhaustion of administrative remedies is futile in this case, and that the available administrative procedures and remedies are inadequate to provide her the relief she seeks.

[73]Hodges v. Callaway, 499 F.2d 417, 421 (5th Cir. 1974). See also McCarthy v. Madigan, 112 S. Ct. 1081 (1992) (federal prisoner seeking money damages under Bivens theory need not exhaust remedies where money damages are not available in administrative process).

[74]10 U.S.C. § 1553(a).

We hold that plaintiff's case does not fit within the futility exception to the administrative exhaustion requirement. We affirm the dismissal without prejudice of plaintiff's claims for declaratory and injunctive relief because those claims should be reviewed, in the first instance, by the military's own internal administrative system. We reverse, however, the dismissal of plaintiff's claim for monetary damages, since such relief is not within the scope of remedies which the Army is empowered to award. We direct the district court to vacate the order of dismissal of the money damage claim and to hold the cause in abeyance until plaintiff has completed the administrative appeal of her other claims.

. . . .

II. The Exhaustion of Administrative Remedies Doctrine and Its Exceptions

A. Exhaustion in General

Under the rule requiring exhaustion of administrative remedies prior to judicial review, a party may not ask a court to rule on an adverse administrative determination until he has availed himself of all possible remedies within the agency itself. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 58 S. Ct. 459, 82 L.Ed. 638 (1938). The major purpose of the exhaustion doctrine is to prevent the courts from interfering with the administrative process until it has reached a conclusion. In McKart v. United States, 395 U.S. 185, 89 S. Ct. 1657, 23 L.Ed.2d 194 (1969) the Supreme Court noted that because the administrative agency is created as a separate entity and invested with certain powers and duties, the courts should not interfere with an agency until it has completed its action or clearly exceeded its jurisdiction. Id. at 194, 89 S. Ct. at 1662. The Court enumerated the practical notions of judicial efficiency which are served by the exhaustion doctrine. A complaining party may be successful in vindicating his rights in the administrative process; if he is required to pursue his administrative remedies, the courts may never have to intervene. When administrative channels are bypassed, subsequent judicial review may be hindered by the litigant's failure to allow the agency to make a factual record, exercise its discretion, or apply its expertise. In addition, notions of administrative autonomy require that an agency be given the opportunity to discover and correct its own errors before a court is called to render judgment. Finally, it is possible that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures. 395 U.S. at 194-95, 89 S. Ct. at 1662-1663.

B. Exhaustion in the Military Context

The exhaustion doctrine has been applied with some irregularity in decisions of the various circuits; however, this court has consistently held that a plaintiff challenging

an administrative military discharge will find the doors of the federal courthouse closed pending exhaustion of available administrative remedies. Hodges v. Callaway, 499 F.2d 417 (5th Cir. 1974); accord, Davis v. Secretary of the Army, 440 F.2d 817 (5th Cir. 1971); Stanford v. United States, 413 F.2d 1048 (5th Cir. 1969); Tuggle v. Brown, 362 F.2d 801 (5th Cir.), cert. denied, 385 U.S. 941, 87 S. Ct. 311, 17 L.Ed.2d 220 (1966); McCurdy v. Zuckert, 359 F.2d 491 (5th Cir.), cert. denied, 385 U.S. 903, 87 S. Ct. 212, 17 L.Ed.2d 133 (1966). Although federal courts are not totally barred from barracks and billets, "a court should not review internal military affairs in the absence of (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of available intraservice corrective measures." Mindes v. Seaman, 453 F.2d 197, 201 (5th Cir. 1971) (emphasis added).

The strict application of the exhaustion doctrine in military discharge cases serves to maintain the balance between military authority and the power of federal courts. "[J]udges are not given the task of running the Army." Orloff v. Willoughby, 345 U.S. 83, 93-94, 73 S. Ct. 534, 540, 97 L.Ed. 842 (1953). Because the military constitutes a specialized community governed by a separate discipline from that of the civilian, orderly government requires that the judiciary scrupulously avoid interfering with legitimate Army matters. In the military context, the exhaustion requirement promotes the efficient operation of the military's judicial and administrative systems, allowing the military an opportunity to fully exercise its own expertise and discretion prior to any civilian court review. Hodges v. Callaway, 499 F.2d 417 (5th Cir. 1974).

C. Exceptions to the Exhaustion Requirement

Notwithstanding the strong policies favoring the exhaustion of administrative remedies in military cases, several established exceptions to the exhaustion doctrine have been held applicable to military discharge actions. First, only those remedies which provide a genuine opportunity for adequate relief need be exhausted. Hodges v. Callaway, 499 F.2d 420-21 (5th Cir. 1974). Second, exhaustion is not required when the petitioner may suffer irreparable injury if he is compelled to pursue his administrative remedies. Rhodes v. United States, 574 F.2d 1179, 1181 (5th Cir. 1978). Third, the doctrine will not apply when administrative appeal would be futile (the futility exception). See generally 5 B. Mezines, J. Stein, J. Gruff, Administrative Law § 49.02[4] (1979). Finally, exhaustion may not be required, under some precedents, if the plaintiff has raised a substantial constitutional question. See Downen v. Warner, 481 F.2d 642, 643 (9th Cir. 1973). But see Stanford v. United States, 413 F.2d 1048 (5th Cir. 1969).

In the instant case, plaintiff asserts that it would be an act of utter futility to pursue the administrative remedies available to her. She also claims that the applicable

administrative procedures and remedies are manifestly inadequate to provide the relief she seeks. Our task is to determine whether plaintiff's case does in fact fit within the futility or inadequacy exceptions to the exhaustion doctrine, allowing her to circumvent the established administrative procedures for review of military discharges.

III. Does This Case Fall Within The Exceptions To The Exhaustion Requirement?

Plaintiff's administrative remedy is set forth in 10 U.S.C. § 1552 (1976), which provides that the Secretary of the Army, acting through the Army Board for Correction of Military Records (ABCMR), may correct any military record when he considers it necessary to correct an error or remove an injustice. The implementing regulation requires the ABCMR, composed of civilian employees of the Department of the Army, "to consider all applications properly before it for the purpose of determining the existence of an error or an injustice." 32 C.F.R. § 581.3(b)(2) (1979).

A. The Futility Exception

Plaintiff made no attempt to appeal her discharge to the ABCMR prior to instituting this suit. She contends that such efforts would be futile because of (1) the 1975 Department of Defense (DOD) policy doctrine on homosexuals within the Armed Forces, (2) the Secretary of the Army's promulgation of paragraph 13-2e of AR 635-200, and (3) the rejection by the ABCMR of similar challenges.

We find plaintiff's futility arguments unpersuasive. First, there is a viable possibility that the ABCMR may determine that Marie Von Hoffburg is not a "homosexual" within the meaning of the DOD's policy directive. Similarly, the reviewing board may determine that she does not possess the "homosexual tendencies" referred to in paragraphs 13-2e and 13-5b(5) of AR 635-200. Quite possibly, the Army could adopt a construction of the contested regulation which would moot the constitutional question in the case.

Clearly the Army ought to be the primary authority for the interpretation of its own regulations. As the district court pointed out, "[t]o date only an Elimination Board composed of five local officers has heard and evaluated the complex issues here involved. The Army should be given the opportunity to fully evaluate its position and, within those parameters, review the decision of the Elimination Board." Memorandum Opinion, Record at 660. If the outcome of the administrative proceedings is adverse to the plaintiff, and she seeks judicial review, the court will at least have a definitive interpretation of the regulation and an explication of the relevant facts from the highest administrative body in the Army's own appellate system. Hodges v. Callaway, 499 F.2d 417, 422 (5th Cir. 1974).

Acknowledging that the ABCMR could afford her some of the relief she seeks, plaintiff points out that even if the board were to find the Army's "homosexual tendencies" regulation unconstitutional or inapplicable to her, and were to recommend her reinstatement to active duty, the Secretary of the Army could overrule that recommendation by providing explicitly stated policy reasons. See Hodges v. Callaway, 499 F.2d 417, 423 (5th Cir. 1974). Since the Secretary has already set forth his policy statement by promulgating paragraph 132e of AR 635-200, plaintiff argues, it is certain that he would overrule any board recommendation and reinstatement. In essence plaintiff contends that the policy statement contained in paragraph 13-2e binds the Secretary to require discharge regardless of any ABCMR findings. To accept this argument would necessarily render the ABCMR powerless to act on any matter arising under any regulation promulgated by the Secretary of the Army; such a result clearly frustrates the purposes of administrative review by the ABCMR.

> [T]o base an exception to the exhaustion requirement on the fact that the final administrative decision is subject to the discretionary power of the Secretary would in effect turn the exhaustion doctrine on its head. Exhaustion is required in part because of the possibility that administrative review might obviate the need for judicial review. That the administrative process might not have this effect is not usually a reason for bypassing it. And since the Service Secretary always has the final say over decisions by both the DRB and the BCMR, appellant's futility reasoning would mean that exhaustion of intraservice remedies should always be excused. The administrative remedy available to grievants like appellant . . . may offer cold comfort and small consolation, but it is surely beyond our authority to permit the exceptions to the exhaustion doctrine to swallow the rule.

Hodges v. Callaway, 499 F.2d 417, 423 (5th Cir. 1974).

Plaintiff further asserts that the ABCMR's rejection of legal challenges similar to hers clearly establishes the futility of an administrative appeal. Plaintiff cites the ABCMR's denial of Miriam Ben-Shalom's petition for the correction of her records as evidence that a challenge to the constitutionality of the "homosexual tendencies, desires or interests" standard of paragraph 13-5b(5) has already been considered and rejected in an administrative appeal under 10 U.S.C. § 1552. See Record at 645-54. We note, however, significant distinctions between the two cases. Miriam Ben-Shalom is a self-professed homosexual who has publicly proclaimed her homosexual tendencies. Having brought herself clearly within the proscription of the regulation she was challenging, Ben-Shalom could not effectively present the vagueness argument raised by plaintiff here. The instant case, on the other hand, presents unique questions of fact and regulatory

interpretation. Whether Marie Von Hoffburg's alleged marriage and presumed sexual contacts with a biologically female transsexual fall within the provisions of AR 635-200 pertaining to homosexuals is an issue which should be determined by the appropriate authorities after full administrative review. We agree with the district court that the treatment of homosexuals in any branch of the armed forces is a matter of great concern and that the instant case is one in which the military should be given a full opportunity to exercise its own expertise and rectify its own errors. See Champagne v. Schlesinger, 506 F.2d 979, 984 (7th Cir. 1974) (exhaustion appropriate even if the meaning of the regulation appears reasonably clear).

B. The Inadequacy Exception

In addition to arguing that exhaustion of her administrative remedies would be futile, plaintiff asserts that exhaustion is not required in this case because the available administrative remedies are inadequate to grant her the relief she seeks. More specifically, she alleges that neither the ABCMR nor the Secretary of the Army has the authority to award damages to compensate persons who have been illegally arrested or searched by military officials. Plaintiff also points out that no formal discovery or subpoena procedures are available to an applicant before the ABCMR.

Plaintiff's inadequacy argument has some merit. As we stated in Hodges v. Callaway, "a plaintiff obviously need not appeal to the particular DRB [Discharge Review Board] or BCMR [Board for Correction of Military Records] if the relief requested is not within the authority or power of those bodies to grant." 499 F.2d at 420-21. Although the ABCMR can change plaintiff's name on her official military records, restore her basic allowance for quarters, reinstate her to active duty, and expunge all record of her elimination proceeding, it cannot award money damages. See 10 U.S.C. § 1552 (1976); 32 C.F.R. § 581.3 (1979). Even if the Army could award such damages, the lack of full discovery and subpoena procedures would make fair litigation of plaintiff's damage claims impossible.

It is clear that appeal to the ABCMR cannot adequately resolve plaintiff's monetary damage claim. Nevertheless, her request for money damages does not preclude application of the exhaustion requirement to her other claims. In Sanders v. McCrady, 537 F.2d 1199 (4th Cir. 1976), the plaintiff argued that he should not be required to exhaust his ABCMR remedy because his claim for money damages prevented the ABCMR from affording full relief. The court rejected this argument, stating that the board's inability to grant Sanders full relief by awarding damages and attorney's fees was not a controlling factor in determining whether Sanders was required to resort to his administrative remedies before seeking judicial relief. The court found that the inconvenience to Sanders and the postponement of his opportunity to obtain

damages and fees were outweighed by the considerations of efficiency and agency expertise underlying the exhaustion requirement. 537 F.2d at 1201.

We find the reasoning in Sanders to be persuasive. All but one of plaintiff's claims for relief can be satisfied by resort to the military's administrative channels. The mere inclusion of a monetary damage claim should not deprive the Army of a chance to review its own rules and regulations prior to judicial intervention. We note, too, the admonition of the second circuit in Plano v. Baker, 504 F.2d 595, 599 (2d Cir. 1974), that "a boilerplate claim for damages will not automatically render the administrative remedy inadequate. Where the relief claimed is the only factor that militates against the application of the exhaustion requirement, the complaint should be carefully scrutinized to ensure that the claim for relief was not asserted for the sole purpose of avoiding the exhaustion rule." While we do not attribute such a motive to the plaintiff before us, we do feel that to allow her to bypass administrative channels because of her monetary damage claim would seriously undermine the utility of the exhaustion of remedies doctrine.

IV. Conclusion

We hold that plaintiff must exhaust her administrative remedies prior to seeking judicial review of her honorable discharge from the Army. We therefore affirm the district court's dismissal of those claims which can be resolved through the Army's internal administrative procedure.

Plaintiff's claim for monetary damages cannot be satisfied by the available administrative remedies; she must resort to the courts for that form of relief. "Practical notions of judicial efficiency" suggest that court review of plaintiff's damage claim be withheld until the military has completed its review of plaintiff's other claims. See McKart v. United States, 395 U.S. 194-95, 89 S. Ct. 1662-1663 (1969). We hesitate, however, to affirm the dismissal of the damage claim for fear of foreclosing plaintiff's opportunity to seek such relief after completion of her military appeal. To avoid the potential bar of a statute of limitations, we remand the case to the district court with directions to vacate the order of dismissal of the claim for monetary damages. We further direct the court to hold the claim in abeyance pending the administrative resolution of plaintiff's remaining claims. See Concordia v. United States Postal Service, 581 F.2d 439, 444 (5th Cir. 1978).

AFFIRMED IN PART; REVERSED AND REMANDED IN PART WITH

DIRECTIONS.[75]

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c. Irreparable Injury. If by ordering exhaustion of administrative remedies the plaintiff will be irreparably harmed, the courts will not require exhaustion and will proceed to the merits of the claim.

HICKEY v. COMMANDANT
461 F. Supp. 1085 (E.D. Pa. 1978)

OPINION

LUONGO, District Judge.

Thomas R. Hickey, a seaman currently assigned to the Naval Support Activity at the Philadelphia Naval Base, petitions this court for a writ of habeas corpus. See generally 28 U.S.C. § 2241 (1976). He challenges as violative of Navy regulations and the due process clause his call to two years of active duty in an enlisted status, a commitment incurred when he was disenrolled from the Naval Reserve Officers Training Corps (NROTC) Program at Villanova University in December 1976. In addition, he alleges that under applicable Navy regulations his high blood pressure disqualifies him for service; consequently, he asserts that his certification by the Navy physician as medically fit for active duty was also in violation of the regulations. On September 13, 1978, I ordered the respondents to show cause why the writ should not be granted, and a hearing was held on September 28, 1978. After careful consideration of the issues raised at the hearing and elaborated by the parties in their memoranda of law, I am persuaded that the writ must be denied.

. . . .

The Navy's second contention--that Hickey's failure to exhaust his administrative remedies renders this action premature--is somewhat more problematic.

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[75]See also Cooper v. Marsh, 807 F.2d 988 (Fed. Cir. 1986) (inadequacy); Sanders v. McCrady, 537 F.2d 1199 (4th Cir. 1976) (inadequacy); Bradley v. Laird, 449 F.2d 898 (10th Cir. 1971) (futility); Schaefer v. Cheney, 725 F. Supp. 40 (D.D.C. 1989); Ayala v. United States, 624 F. Supp. 259, 263-64 (S.D.N.Y. 1985) (inadequacy); Watkins v. United States Army, 551 F. Supp. 212 (W.D. Wash. 1982) (futility), rev'd on other grounds, 721 F.2d 687 (9th Cir. 1983).

The Navy argues that appeal to the Board for Correction of Naval Records (BCNR) is a necessary prerequisite to judicial review. See generally 10 U.S.C. § 1552 (1976); 32 C.F.R. § 723 (1977). The threshold question, of course, is whether resort to the BCNR is an appropriate remedy under the circumstances of this case. . . .

. . . .

[S]everal factors in the case before me militate against abstention, at least with respect to the challenge to the initial activation order. The most obvious is the delay involved in an appeal to the BCNR. As the Navy conceded during the hearing, proceedings before the Board could take as long as 18 months before the claim is finally resolved. This delay bespeaks the potential for irreparable injury to the petitioner who is currently fulfilling the active duty obligation here challenged. This consideration differentiates Hickey's position from the paradigm case in which resort to the service's Board for Correction of Military Records was required as a prerequisite to judicial review. See Hayes v. Secretary of Defense, 169 U.S.App.D.C. 209, 515 F.2d 668, 674-75 & n.30 (1975). Hickey seeks to obtain rather than to prevent a discharge from the service. Refraining from judicial action in the latter situation rarely involved the prospect of irreparable injury. Moreover, if the party seeking to remain in the service were discharged before the Board could review the claim, the Board could grant the serviceman full retroactive relief. See id. at 674 n.30. Here, however, even if the Board were to decide in Hickey's favor, the only relief forthcoming would be an honorable discharge. The Board could not adequately compensate Hickey for the time spent in active enlisted service pursuant to an order that was issued in violation of the regulations. [The court, while declining to dismiss the plaintiff's complaint based on his failure to exhaust administrative remedies, ruled in the Navy's favor on the merits of the claim.][76]

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[76]See also Tartt v. Sec'y of Army, 841 F. Supp. 236, 240, n.1 (N.C. Ill. 1993); Goodrich v. Marsh, 659 F. Supp. 855, 856-57 (W.D. Ky. 1987). But see Martin v. Stone, 759 F. Supp. 19, 20 (D.D.C. 1991) (fact that separated cadet is falling behind peers at U.S. Military Academy during pendency of challenge to separation does not present the kind of irreparable harm that warrants premature judicial intervention in military personnel action).

d. Purely Legal Issues. If the issues raised by a plaintiff's complaint are exclusively legal in character, courts may not require exhaustion.[77] Courts consider themselves, not the military's administrative remedies, to be the proper forums for such issues.

DOWNEN v. WARNER
481 F.2d 642 (9th Cir. 1973)

Before BROWNING, DUNIWAY, and ELY, Circuit Judges

OPINION

ELY, Circuit Judge:

Gail Waugh Downen served as a regular officer in the United States Marine Corps until her marriage to Robert E. Downen. Since Mr. Downen was then the father of two children, ages thirteen and fifteen, Mrs. Downen was on January 31, 1969, discharged from the service pursuant to a Corps regulation that terminates the commission of any female officer who becomes "the step-parent of a child under the age of 18 years who is within the household of the woman for a period of more than thirty days a year. . . ." 32 C.F.R. § 714.1(d)(3)(i)(c); 32 C.F.R. § 730.61(c)(2)(iii).

In December of 1970, Mrs. Downen complained in District Court that the regulation compelling her separation from the Corps unconstitutionally discriminated against her solely by reason of her sex in violation of the due process clause of the Fifth Amendment. She sought a judgment (1) declaring that her discharge was unconstitutional, and (2) ordering reinstatement along with back pay and allowance.

The District Court declared that Mrs. Downen should first have sought administrative relief through the Board for Correction of Naval Records. Her failure, in the court's view, to exhaust this administrative remedy deprived the court of jurisdiction and the action was dismissed.

The judicially-created exhaustion requirement is intended to facilitate the development of a full factual record, to encourage the exercise of administrative expertise and discretion, and to promote judicial and administrative efficiency. See

[77] See, e.g., Committee for G.I. Rights v. Callaway, 518 F.2d 466, 474 (D.C. Cir. 1975). But cf. Ayala v. United States, 624 F. Supp. 259, 263 (S.D.N.Y. 1985); Benvenuti v. Sec'y of Defense, 587 F. Supp. 348 (D.D.C. 1984) (constitutional issues reviewable by ABCMR).

McKart v. United States, 395 U.S. 185, 194-195, 89 S. Ct. 1657, 23 L.Ed.2d 194 (1969); United States v. Nelson, 476 F.2d 254 (9th Cir. 1973); United States v. Hayden, 445 F.2d 1365, 1375 n.16 (9th Cir. 1971); Wills v. United States, 384 F.2d 943, 945 (9th Cir. 1967). The doctrine is not an absolute bar to judicial consideration and where justification for invoking the doctrine is absent, application is unwarranted. See id. Resolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board. Mrs. Downen's complaint rests solely upon the resolution of her constitutional claim. Accordingly, Mrs. Downen was not barred from District Court through her failure to exhaust administrative remedies.

[The Court of Appeals remanded the case to the district court for resolution of the plaintiff's complaint on its merits.]

Where the administrative agency's decision may moot the constitutional question, or where it may provide a factual matrix necessary to the resolution of the constitutional or legal question, exhaustion of the administrative remedy is necessary.[78]

e. Avoid Piecemeal Relief. Especially in class actions, where administrative remedies can only afford relief on an individual basis, exhaustion may not be required. In such cases, immediate judicial review may be a more efficient and economical means of disposing of the case.[79]

[78]Robbins v. Lady Baltimore Foods, 868 F.2d 258, 263-264 (7th Cir. 1989); Republic Industries v. Central Pa. Teamsters, 693 F.2d 290, 296 (3d Cir. 1982).

[79]See, e.g., Committee for G.I. Rights v. Callaway, 518 F.2d 466, 474 (D.C. Cir. 1975); Walters v. Sec'y of Navy, 533 F. Supp. 1068 (D.D.C. 1982), rev'd on other grounds, 725 F.2d 107 (D.C. Cir. 1983)